No. 16,405

United States Court of Appeals

For the Ninth Circuit

TRAVIS BUFORD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

LYNN J. GILLARD,
United States Attorney,
JOHN H. RIORDAN, JR.,
Assistant United States Attorney,
JOHN KAPLAN,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Statutes and Regulations

Texts

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BRIEF FOR APPELLEE.

JURISDICTION.

A three-count indictment was returned on August 28, 1958, by the Grand Jury of the Northern District of California against appellant and one Teresa Turner.

Count No. I charged appellant and Teresa Turner with the sale of narcotics in violation of Title 26 U.S.C. Secs. 4704 and 7237 on July 30, 1958.

Count No. II charged the appellant, alone, with another sale of narcotics in violation of the same sections on August 4, 1958.

Count No. III charged appellant and Teresa Turner with conspiracy to violate the narcotic laws of the United States, in particular Title 26 U.S.C. Sec. 4704, (T.R. p. 3).

To each of the counts the appellant pleaded "Not Guilty," and waived trial by jury. On February 26, 1959, the case came on for trial before the Court sitting without a jury, Honorable Michael J. Roche presiding. At the conclusion of the Government's case, appellant made a motion for judgment of acquittal which motion the Court denied. At the conclusion of the trial the Court found appellants guilty on all three counts. Teresa Turner was convicted and sentenced on the 1st and 3rd counts of the indictment, but has taken no appeal. Notice of Appeal was filed by the appellant on February 17, 1959.

Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1291.

STATEMENT OF FACTS.

On July 30, 1958, between 2:30 P.M., and 2:45 P.M., agents of the Federal Bureau of Narcotics had a woman informer searched at the Central Emergency Hospital in San Francisco by a nurse and doctor. The informer was equipped with a Schmidt device, a radio transmitter, which was carried in her purse. The radio transmitter and receiver were tested before use. The agents then gave $40.00 to the informer and took her to the vicinity of 1503 Ellis Street in San Francisco, a barbershop at which appellant was employed, which address she was observed to enter at approximately 3:00 P.M., (T.R. pp. 25-29).

Federal Agent Yannello heard over the radio receiver the informer say upon entering the shop: "Hi,

Travis, honey, . . . I have $40.00 and I'd like to have some of the action we talked about." The agent heard a voice respond, "All right, be by at 6:30 and it will be all set," (T.R. p. 32). The informer remained in the barbershop about five minutes and then returned to the agent's automobile parked about half a block away. The informer was then taken back to the hospital and searched by the nurse and doctor, and her clothing was searched by the agents. The $40.00 mentioned above was missing (T.R. p. 32).

The informer was similarly searched about 6:30 P.M., the same evening, equipped with a radio transmitter, and under the surveillance of the agents, she entered the barbershop at approximately 7:00 P.M., (T.R. pp. 33-36). Immediately upon the informant's entering the barbershop, the voice mentioned previously was overheard to state, "I will be with you in a minute, just as soon as I finish this process job." (T.R. 38 and T.R. 57). The agents then overheard by means of the radio the voice state to the informer, "I got you two $20 papers and I want to taste some of it." The informer stated, "all right." At that time there was a knock heard on the radio device and the informer said: "Teresa, get your black fanny away from here—you always want some for free." The informer was heard to say, "I'll be by tomorrow and make a little bigger buy, is that all right?" The voice replied, "Fine, if my store hasn't run out of stuff you can pick it up. And today, when the connection came by I wasn't in the barber shop; so, he gave the stuff to Teresa and she gave it to me when I came back."

(T.R. pp. 59-60). The informer left the barbershop and walked about a block and a half and gave the narcotics to the agent (T.R. 60). (Exhibit I)

On August 4, 1958, about 6:00 P.M., the informer was similarly searched (T.R. 61). She was subsequently furnished $100.00 of Government funds and with a radio transmitter, and was accompanied by the agents to the barbershop at approximately 7:00 P.M., and entered therein. The informer was heard over the radio device to say, "Travis, I want to get two spoons of Coc." The voice mentioned previously replied, "I will have to call my connection and place the order." (T.R. 73).

Appellant was observed leaving the barbershop at approximately 8:00 P.M., and returned to the barbershop at approximately 8:45 P.M., (T.R. pp. 40-41). At approximately 8:50 P.M., the agents heard the previously mentioned voice state over the radio device, "Here's the stuff, but be careful—it is more powerful than the last stuff, and I want to take a snort before you go." (T.R. p. 75). Five minutes after this last conversation overheard over the radio device, the informer joined the agents and handed him the narcotics of Exhibit No. II, (T.R. pp. 75-76). These facts were admitted by appellant after arrest. (T.R. p. 65).

On August 7, 1958, Agent Yannello arrested the appellant along with co-defendant Teresa Turner, who was convicted but is not appealing. At that time the agent repeated all of the previous conversations, identifying appellant as the aforementioned voice. Appel-

lant then admitted that the above recital of facts was in substance correct saying, "That is exactly what happened."

QUESTIONS PRESENTED.

1. Was an illegal conspiracy proved?

2. Was the evidence on the two substantive counts sufficient to sustain the verdict of guilty?

3. Was hearsay evidence wrongfully admitted?

ARGUMENT.

I. AN ILLEGAL CONSPIRACY WAS PROVED.

Defendant's argument that no illegal conspiracy has been entered into borders upon the frivolous. First of all, the jury found that a conspiracy was entered into between Teresa Turner and the appellant, not between the appellant and Malvina Webb. In the latter case, the cases cited by the appellant on Pages Nos. 11 and 12 of its brief would be apposite since it is agreed that where the nature of the crime requires two participants, these two participants may not be charged as the sole conspirators. If the nature of the crime requires two participants, however, and more than two people agree to participate, a conspiracy can be entered. Here the conspiracy was not between the two parties necessary to the transaction, but rather between the appellant and Teresa Turner. See *Lett v. United States,* 15 F.2d, 690.

II. THE EVIDENCE ON THE TWO SUBSTANTIVE COUNTS WAS SUFFICIENT TO CONVICT.

There was sufficient evidence for the judge to find the appellant guilty on the two substantive counts. Appellant bases his entire argument on this point on the fact that the voice of appellant could not be recognized over the Schmidt device. Were it solely a question of the recognition of the voice of the appellant, the Government would have no choice but to confess error. Here, however, there are other items which are sufficient to support the judge's verdict. First, and most important is the fact that the appellant admitted the violations and admitted that the voice was her's. It is difficult to find stronger evidence than this. Furthermore, the nature of the conversation with the informer and, most specifically, the fact that some of the words appeared to have been in answer to the name of the appellant. For instance, the appellant said, "Hi, Travis, honey; I have $40.00 and I would like to have some of the action we talked about." In reply to this the voice said, "All right, be by at 6:30 and it will be all set." From this the judge could conclude—and obviously did, that the voice belonged to Travis Buford, the appellant. Secondly, on August 4, the informer was heard to say, "Travis, I want to get two spoons of Coc." In reply to this, the voice said: "I will have to call my connection and place the order." Certainly, the judge could conclude that this reply, too, was spoken by the person to whom the request was made. Lastly, the Government produced an agent who testified that he heard the appellant make a remark which was the same remark made by the unidentified voice heard over the Schmidt device.

Certainly, the judge could conclude that since the Schmidt device picked up this remark only once, only one person made it and that person was the appellant. From this evidence the judge could infer, since the testimony was that the same voice made all of the remarks attributable to the unidentified voice, that the appellant had, as she admitted, made all the remarks attributable to her.

It should be remembered in reviewing this case that this Court is not passing on the question of whether the Government has proved to its satisfaction beyond a reasonable doubt the guilt of the appellant upon the two substantive counts. The judge who heard the witnesses has determined that, and it is for this Court merely to decide whether there was sufficient evidence so that a reasonable judge could conclude as this judge did. The Government submits that the evidence here is ample to sustain that burden.

It is a well established principle that this Court will indulge in all reasonable presumptions in support of the ruling of the trial court, and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C.A.9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A.9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th);

Bell v. United States, 185 F. 2d 302, 308 (C.A. 4th);

Gendelman v. United States, 191 F. 2d 993 (C.A.9th);

Barcott v. United States, 169 F. 2d 929, 931 (C.A.9th) cert. denied 336 U.S. 912.

The proof in a criminal case need not exclude all possible doubt, but need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt.

Henderson v. United States, 143 F. 2d 681 (C. A.9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A.9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th).

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue. Wigmore on Evidence (3d ed. 1940), Vol. IX, Sec. 2497, p. 324.

An appellant court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial court.

Gage v. United States, 167 F. 2d 122, 124 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A.9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254;

Gendelman v. United States, 191 F. 2d 993 (C. A.9th);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (C.A.9th).

III. THE EVIDENCE OF APPELLANT'S STATEMENTS WAS PROPERLY ADMITTED.

Appellant's third point, that of the hearsay, is basically the same as its previous points. Admittedly, all extrajudicial statements made by the defendant out of Court are hearsay. They are admitted, however, under the admissions exception to the hearsay rule. The question here is whether the judge could find that the statements were in fact made by the defendant. The Government submits again that the evidence was sufficient for the judge so to find and that, therefore, there is no hearsay problem.

For the foregoing reasons the judgment should be affirmed.

Dated, San Francisco, California,
July 7, 1959.

LYNN J. GILLARD,
United States Attorney,
JOHN H. RIORDAN, JR.,
Assistant United States Attorney,
JOHN KAPLAN,
Assistant United States Attorney,
Attorneys for Appellee.